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Supreme Court of the United States.

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OCTOBER TERM, 1935.

No. 403, 404.

GEORGE ASHWANDER et al.,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY et al.,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

THE SUIT AND CONTROVERSY.

The suit on which this petition is based is a stockholders' suit, filed on September 13, 1934, by stockholders of Alabama Power Company, in the Circuit Court of Lime-

stone County, Alabama, against that corporation, the Tennessee Valley Authority (TVA), a federal agency functioning under color of the Tennessee Valley Authority Act of 1933 (approved May 18, 1933, 48 Stat. 58, 16 U. S. Code 831-831cc), the three directors of TVA, and eighteen municipalities of North Alabama in or proposing privity with TVA in furthering its commercial electric power program in competition with Alabama Power Company; also an agency of TVA for promoting installment sales of electric appliances known as Electric Home and Farm Authority, Inc. (EHFA).*

The appropriateness of the stockholders' suit, compliance with Equity Rule 27, the showing of injury and right to challenge the acts, transactions and statute in controversy, were sustained by the District Court, after removal, under full findings of fact (II-1036, 1040) and conclusions of law (II-1097-1099) upon those issues, not modified by the Circuit Court of Appeals.

Removal was obtained by TVA on the correct averment, in so far as its power business and program is involved, that the controversy in suit directly involved and presented for decision:

> "(1) The constitutionality, interpretation and construction of the Tennessee Valley Authority Act herein above referred to.
>
> • • • • • • •
>
> "(4) The legality of the various contracts and agreements described in the original bill of complaint, and alleged to have been executed under the author-

*The proof as to this corporation as an agency of the Tennessee Valley Authority, established by the findings and conclusions (Nos. 96-103, II-1070-1972, and No. 26, II-1100) and resulting in the annulment by the final decree of its agency contract with Alabama Power Company, appears to require no further statement as a result of its recent dissolution publicly announced by the Administration.

ity of the Tennessee Valley Authority Act herein above referred to.

"(5) The legality of the entire program of the respondent Tennessee Valley Authority under the Tennessee Valley Authority Act and the Constitution of the United States."

Manner in Which the Questions Stated Are Presented.

1) The Alabama Power Company, proposing to yield to the assertedly illegal TVA program rather than take issue with the Administration under the circumstances of high public tension shown by the record, as well as by reason of the threats of duplication and circumstances of practical coercion accompanying the aggressive execution of the program, entered into a contract with TVA dated January 4, 1934 (I-133), under which the Power Company agreed to sell its rural distribution systems and its transmission lines serving seventeen municipalities in the area desired by TVA in seven North Alabama Counties. The contract as to these lines and systems was wholly in furtherance of the TVA commercial program, would serve no federal use of power, the transmission lines being intended and adapted solely to service of the commercial market, and was found and held by the District Court to be invalid and subject to annulment by the Power Company at the suit of petitioners on that ground. The consideration to be paid by TVA was approximately 60% of the replacement value of the properties stipulated in the contract, reflected no severance damage and no going value. The District Court, finding the contract illegal and unenforceable because in direct furtherance of the illegal objective of TVA, declined to hear further evidence as to the value of the property.

2) The effect of this contract, if executed, was to leave

the utility's seventeen municipal distribution systems without supply lines or source of power and without road and street franchises or certificates of public convenience and necessity with which to re-acquire them on expiration of the final date of the contract (Sec. 21, I-149). Under date of August 9th, under the same circumstances under which the contract of January 4th was executed, Alabama Power Company gave to TVA an option on the seventeen municipal distribution systems, which it elected to exercise; but, by reason of the conditions reserved in the option, TVA terminated the option prior to the final hearing and decree in the cause. TVA accompanied its termination of the option with advice to the seventeen municipalities to proceed with their applications for Public Works Administration loans and grants with which to construct systems to be supplied with TVA power and function under control of TVA and at retail rates fixed by TVA in competition with Alabama Power Company. TVA took effective steps to further government loans to that end, which had (in the typical case of the City of Decatur) been formally approved by the Government (PWA) in furtherance of the TVA program (II-685, 686). This arrangement contemplated direct competition with the Power Company; and contemplated, as reported by the staff of the Public Works Administration, approved by the latter, that this competition would result in the absorption of all of the Power Company's business, beginning with 75% of it during the first year (II-689, top).

3) These so-called loans were to be, in fact, lien-investments by the government in furtherance of the TVA electric program. The systems were to be constructed without pecuniary responsibility on part of the municipalities, which had already exceeded their constitutional debt limits; were to be dominated by the government (TVA) as

to rates, service regulations, accounts and disposition of revenue and operated under covenant primarily for the account of the government until the investment should be liquidated.

A question presented on this record is whether this arrangement with the towns in its entirety constituted direct TVA competition with the Power Company, both as to the delivery of power by TVA at the city gates and as to the competitive distribution proposed in the seventeen towns, illegal both by reason of the illegality of the wholly commercial manufacture and distribution of electricity by TVA within state domain and because threatened as to competition within the seventeen towns by illegal use of federal funds to be advanced, expended and employed in constructing and operating systems thus dominated and controlled by the government.*

4) After the necessary preliminary demands that the Power Company take action to terminate and withdraw from the contract of Jan. 4, 1934 (because in furtherance of a program in violation of the Constitution—*Central Transportation Co. v. Pullman*, 139 U. S. 24, 55; *Thomas v. R. R. Company*, 101 U. S. 71) and take action to protect the Company against the illegal business, competition and objectives of the TVA program and against the illegal means threatened and employed, the stockholders' suit

*This question of municipal system control by TVA was not considered by the Circuit Court of Appeals. It is presented on this record in addition to the question of legality of commercial operation of steam plants and commercial operation of the hydro-electric plants and utility program. The question of federal loans thus actively employed in a utility business controlled by the government in competition with the Power Company distinguishes the question here from other pending cases involving the legality of appropriations for municipal systems, where not controlled or operated by or for account of the government.

In this cause the District Court held that the loans were illegal because found in fact and by declaration of the government to be in furtherance of the illegal commercial system proposed by TVA; and did not consider separately the question of TVA control of rates, service regulations, revenues, etc.

was filed by plaintiffs for the protection of the Power Company from the consequences of the program, involving initial loss of its transmission lines, public franchises and service area, and threatening indefinite and continuing extension of that loss as the additional commercial power plants were brought into operation and the TVA network extended in state domain. Declaratory relief as to proposed extensions of the competition was urged upon and pretermitted by the District Court (See *infra*).

The immediate program involved or threatened a loss of 10,000 customers and service of five entire and two fractional counties, or approximately one-tenth of the direct customers and service area of the Corporation, which has a total investment, according to the accounting classification prescribed by Alabama Public Service Commission, of $180,000,000.

5) There was final decree by the District Court on March 2, 1935, granting basic relief to plaintiffs (petitioners). The final decree was predicated on the lack of constitutional power of Congress to authorize or the Tennessee Valley Authority to undertake the power manufacture and distribution program from war purpose plants and navigation dams, and the acts and transactions in furtherance of that program, complained of as resulting in or threatening direct and actionable injury to the Alabama Power Company.

6) Because of the public importance of the cause the Circuit Court of Appeals, on special application, consented to expedite submission of appeals to that Court, took submissions on June 17th, 1935, and on July 17th reversed the decree of the District Court and has on application stayed the mandate in order to permit this application for certiorari to be presented and considered.

7) The amendment to the TVA Act which went to the President for approval on August 21, 1935, in no material respect avoids or purports to restrict the scope of the commercial program involved on this record or the discretion of TVA as to the acquisition and commercial utility operation of steam-electric plants, hydro-electric plants, transmission lines, utility systems or the commercial and proprietary distribution of electricity for sale to the general public, or makes moot any question stated in this petition.

II.

SUMMARY OF FACTS.

8) The dominant objectives of the Tennessee Valley Authority power program are as thus stated in its official release of January 6, 1934 (II-623, at p. 624):

> "The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public utilities not by quasi-judicial commissions, but by competition. The Act definitely puts the Federal government into the business of rendering electric service. The Authority is required to acquire a market, to set up an area in which to conduct its operations. The results of these operations in this limited area are intended to serve as a 'yardstick' by which to measure the fairness of the rates of private utilities, and to prevent destructive financial practices by private utilities.
>
> "* * * In carrying out this competitive relation between the Federal Government and the private business of electricity, the wastes of competition are to be eliminated, and the regulatory function of competition emphasized."

The District Court's finding of the primary objectives

of the TVA program (II-1059-1060; Nos: 70-71) includes, in addition to the regulation of intrastate utilities and supplementing of state commissions stated above, the following, *inter alia*:

—promotion of public ownership of electric utilities;

—the control of the utility functions of its distributors;

—to earn a profit, in order to reimburse the Treasury and round out the system;

—social betterment, general welfare, promote use of electricity and prevent waste.

The question is, accordingly, presented on this record whether the program in its entirety, by reason of its integral and intrinsic characteristics as well as by reason of its dominant objectives, and in the means adopted and proposed, does not transcend any lawful function of the federal government and attempt to assert powers and functions reserved to the States and the people, as well as objectives not constituting a function of government, state or national.

9) In addition to existing commercial steam-electric plants at Muscle Shoals and in North Mississippi and such additional units as TVA in its sole discretion may elect to construct or acquire, the program contemplates the control or direct manufacture and distribution by TVA of all remaining potential electric water power in the entire Tennessee drainage basin, having a potential capacity, in addition to the power capacity of existing utilities, of five times the entire market requirements estimated by the Corps of Engineers for the year 1950. A brief outline of the territorial scope is set out in the formal announcement attached as Exhibit 3 to the original

bill (Rec., II-108). The essential characteristics of the program are set out in the official releases by TVA which were proven (Finding No. 117, II-1078) as excerpted in Exhibits 4 (I-111), 7 (I-165), 9 (I-170) of the bill of complaint, and can be only generally indicated in this summary statement.

10) The essential characteristics of the plan were declared in the findings to have no relation to any federal function (No. 73; II-1061). The program was formulated:

> "from the standpoint of the successful establishment and permanent operation of an independent and well rounded government-owned electric distribution system and the general civic, social and industrial planning and development of the Tennessee Valley region as a whole" (No. 26, II-1042);

contemplated not only generation but transmission and distribution, both wholesale and retail (II-1059, No. 68). The conception was to establish an independent network comparable in all respects with the electric utility systems serving the area (No. 69, II-1059).

11) The power policy is not designed or limited with a view to marketing of power produced merely at Muscle Shoals (II-1042). It contemplates long term commitments, utility in type (II-1045, Nos. 32, 33), under 20-30-50 year contracts made actionable by the Act. The operation of the Muscle Shoals plants is not reasonably required for the maintenance of those units in reserve or stand-by condition (No. 43, II-1048).

12) The TVA program "contemplates full corporate discretion by TVA in developing and extending its electric system and service" (II-1059).

13) The TVA program, as being administered, contem-

plates, preferentially, the promotion by TVA, financed by the government, of public ownership of local distribution systems (and in the case of the Alabama towns, which have generally exceeded their debt limits, without recourse on the municipalities), to be supplied by TVA at the city gate, in lieu of existing public utilities serving the desired area.

If public ownership cannot be brought about, or until it is accomplished, TVA will, in its discretion, construct or acquire and operate direct the local utility distribution in the desired area, whether rural or urban, as well as the transmission lines and the steam or diesel or hydro-electric power plants supplying the electricity, in competition with existing public service companies, if they do not yield to the terms of TVA.

At the time the bill was filed the program contemplated direct operation in the seventeen municipalities served by Alabama Power Company in the area immediately involved. Shortly before final decree the plan was changed to government supply of funds with which to construct competitive systems within the towns, to be supplied with power and controlled by TVA.

14) In all cases where TVA manufactures and transmits power to a municipality or a local system, it subjects the latter, by contract, to control by TVA as to its rates, service regulations, accounting, disposition of revenue and reserves and other essential utility functions, on the theory, as stated in its corporate minutes, that fulfillment of the President's program and the yardstick policy "embodied in the Tennessee Valley Authority Act * * * necessarily means public operation from power house to consumer's premises. It is for this reason that the Authority has adopted a policy of rate and accounting control of municipal distribution operations" (Minutes, Oct. 13, 1933,

II-543). This effective, contractual control of resale rates is a dominant and unvarying element in the purpose and program, attaching to all distributors and intentionally accompanying the proposed federal loans, and TVA city gate contracts.

15) Although, in theory, the local utility distributor (where distribution is not directly undertaken by TVA) may remain subject to regulation under the continuing police power of the State, which theoretically it may not surrender (*Oppenheim v. City of Florence,* 229 Ala. 50, 155 So. 859), this control reserved to the State is without effect under the TVA procedure since the federal government (TVA or PWA, etc.) supplies the entire investment, takes a lien or right of specific performance, and TVA supplies the current under contract which it may terminate, without liability or control or recourse by the State or its citizens, if the distributor does not comply with TVA contract requirements as to rates, service regulations, accounts, disposition of revenue, etc., leaving the public and the State without recourse.

Effect on Plaintiffs' Corporation and Other State-Regulated Utilities in Region.

16) The acts and transactions in furtherance of and a part of the program challenged on this record would, if executed, result in the immediate substantial withdrawal from five entire and two fractional counties in Alabama and threaten the progressive exclusion of the Alabama Power Company from its intra-state utility business and service area within the State of Alabama and involve the present and progressive surrender, loss or abandonment of its public franchises, licenses and business.

Like result threatens all utilities within the 42,000

square miles, with a population of 2,000,000 (II-1058), selected and announced by TVA as the market for its initial commercial system and "yardstick" demonstration*, according as the latter has elected (as shown on this record in the case of the Tennessee Public Service Company and the Tennessee Electric Power Company, in addition to Alabama Power Company and Mississippi Power Company) or may at will elect to take the respective utility markets from existing utilities or bring about the sale of their respective properties. The utility service proposed to be taken over immediately by TVA at the time of the filing of this suit involved fifty counties, forty-three thousand direct customers and a population of 691,893 (Finding No. 74, II-1062).

III.

THE PRINCIPAL QUESTIONS INVOLVED AND PRESENTED.

17) The proceeding challenges the validity of a series of acts and transactions of competition or arbitrary administrative action directed at the Alabama Power Company by Tennessee Valley Authority under color of the Tennessee Valley Authority Act, and the validity of that Act, in that, **as construed and under administration by the Authority**, the Act purports to authorize non-federal commercial functions and to delegate unlimited legislative authority to the Tennessee Valley Authority in the matter of the establishment and operation of a commercial electric network, including, as asserted by TVA, the legislative discretion and authority at will and arbitrarily to extend and

*or outside this area in the event that in the opinion and discretion of TVA the existing utility rates are high or public regulation of utilities has failed (I-108, 110).

monopolize utility service and control and destroy existing properties.

A statement of the conflicts of the program and of the Act with the Fifth and Tenth Amendments and Art. I, Sec. 1, of the Constitution, involved and presented on this record, requires an analysis of the essentials of the program both in its entirety and in detail. These are adequately indicated in the characteristics of the program set out in the findings and conclusions of the District Court under Equity Rule 70½ (II-1035, et seq., Nos. 26 to 94; Conclusions, II-1091).

They will be briefly outlined in the accompanying memorandum brief. They include, as construed and administered by TVA, complete discretion as to where, whether and when TVA will establish in state domain a federal electric utility business, select existing utilities for competitive destruction or forced sale of their properties to TVA, dominate the rates, service regulations, accounts and disposition of revenue by distributing utilities in privity with TVA, bind the Government to utility servitude under long-term contracts on which suit may be maintained, determine in its sole discretion as to the acquisition and commercial operation of inland commercial steam-electric and hydro-electric plants, and, in general, subject the government of the United States to a region-wide utility servitude throughout state domain in all respects comparable and competitive with public utilities subject to state regulation.

The Respective Sources of Electricity for the TVA Program, Means of Competition and Certain Basic Questions Presented as to Each.

18) The source of electric power contemplated for the commercial program in competition with Alabama Power

Company and other utilities in its selected area is to be an interconnected pool of electricity manufactured by the government (TVA) at steam-electric, hydro-electric and diesel-electric plants operated directly by the government (TVA), also electric power purchased from other producers of electricity for the purpose of resale. These sources include the following groups:

(a) The steam-electric plant at Muscle Shoals, constructed under color of Sec. 124 of the National Defense Act of 1916 not merely for the manufacture of munitions of war but on its face and, as restated by the House Committee on Military Affairs*, by its terms to be adapted to the manufacture of other useful products. These plants were committed to maximum fertilizer and power production for commercial sale in the competitive market by the Muscle Shoals Acts of 1928 (S. J. Res. 46) and 1930 (S. J. Res. 49) not approved by Mr. Coolidge and vetoed by Mr. Hoover, respectively.

This steam-electric plant has a capacity of 40,000 k. w. or 350,000,000 kwh of prime power annually and its inclusion in the means and agencies proposed to be used in competing with the Power Company involves and presents the primary question, neither decided or discussed by the Circuit Court of Appeals, whether Congress can intentionally authorize a steam plant to be operated by the government in a permanent commercial manufacturing business for sale of the product throughout state domain.

(b) The same question is presented as to the steam-electric plants purchased by TVA in North Mississippi, located at Tupelo and Amory.

(c) The hydro-electric units installed at Wilson Dam

*House Report No. 1372, 74th Cong., 1st Session, to accompany H. R. 8632, June 26, 1935, at page 4.

were constructed under the same Act as the steam-electric plant and as part of the Muscle Shoals project. This dam also aided navigation. The eighteen emplacements constructed in the dam for turbo-generators and the ten commercial generators installed on those emplacements for the manufacture of electricity are not of any aid to navigation. They are not installed or designed as aids to navigation. The actuation of locks, gates and all navigation facilities is provided by a small 750 h. p. unit operating independently of the commercial units. There are 149 potential water power sites in the Tennessee Basin. The TVA plan embraces them all. The Chairman of TVA testified that there was no physical or functional relationship between commercial hydro-electric plants in these units and navigation; only the fiscal or economical relation of revenue (II-407).

The Circuit Court of Appeals conceived that under the Commerce Clause the power to build a dam designed for power emplacements carries the proprietary or commercial right to install a plant and manufacture electricity at such plant for transmission and sale throughout state domain in competition with citizens or the state regardless of the objective.

A question is presented as to such hydro-electric plants, whether, as insisted by petitioners, the Circuit Court of Appeals has misinterpreted the decisions of the Supreme Court in the first and second Green Bay Cases (*Kaukauna Water Co. v. Green Bay Canal Co.*, 142 U. S. 254, and *Green Bay Canal Co. v. Patten Paper Co.*, 172 U. S. 58) and in *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53, in fundamental particulars, viz., to the extent of holding that the construction of a navigation dam confers proprietary and commercial rights in the running waters, as distinguished from the right of manipulation and control in the regulation of navigation (*Wisconsin v. Illinois*, 278 U. S. 367); whether,

as contended by TVA and apparently sustained by the Circuit Court of Appeals (denied by petitioners) the Boulder Dam Case (*Arizona v. California,* 283 U. S. 426) is authority for a claim of proprietary ownership; and whether the effect of the decision of the Circuit Court of Appeals is not to over-rule and supersede the principle established by the line of decisions represented by *Pollard v. Hagan,* 3 How. 212; *Shively v. Bowlby,* 152 U. S. 1; *Port of Seattle v. Oregon-Washington Ry.,* 255 U. S. 56.

The question is also presented as to the distinction, not reflected in the opinion or conclusion of the Circuit Court of Appeals, between surplus water (that is, water admittedly not necessary to be manipulated in furtherance of navigation) constituting the raw material or mechanical power out of which electricity may be manufactured, and the wholly different commodity (electricity) resulting from the use of those waters in a definite manufacturing process (*Utah Power & Light Co. v. Pfost,* 286 U. S. 165).

As to Certain Means of Competition in State Domain.

19) The foregoing questions are involved and presented on this record as to the legality of the commercial manufacturing process, whether steam-electric or hydro-electric, employed to produce the commodity at the government plants. The cognate questions are presented as to the legality of the alternative means of distribution and sale undertaken and threatened by TVA.

(a) By establishment of a regionwide, permanent utility network throughout state domain. The question presented is whether that type of business is a federal function, from the standpoint of the mechanism itself and from the standpoint of the objectives shown on the record.

(b) By cooperatives and no-recourse municipalities having no investment, subject to lien and complete control as

to rates, accounts, service regulations and revenues by the government (TVA). The question here presented is whether the government may lawfully employ these means to further its competitive distribution of electricity within state domain.

Other Questions Directly Presented.

20) The record also presents the distinction between (a) the lease or sale (that is, disposal) of that which the government owns, viz, a steam-electric plant, emplacements in a navigation dam, hydro-electric units installed on emplacements in a navigation dam, and (b) engaging in the commercial business of manufacturing electricity at such plants and marketing the product, not at the dam or on federal domain or government controlled property but by organizing, financing and operating a transmission or utility business, and exploiting, promoting and making sales throughout state domain in unregulated competition with public utilities serving the area; in effect selling personnel, credit, capital and personal services.

21) In general, the record presents the basic question whether Congress can provide for the construction of plants and buildings for war, departmental or other legitimate national purpose, and thereupon, when it is found that they are overbuilt for national purposes or the purpose is spent or obsolete or the facility is desired to be held for future use, proceed to authorize direct use of the property or facility by the government itself for the commercial manufacture and sale of any and all commodities which may be possible to produce on or by means of the property, in the general market, in competition with citizens.

22) The question is also presented whether, if and to the extent that TVA could under any circumstances be held vested with legislative or administrative discretion to fill

in the details of the all-comprehensive social-economic-war-navigation objects of the Tennessee Valley Authority Act, the action of TVA is so manifestly arbitrary and punitive from an administrative standpoint as to the Alabama Power Company, in taking over its property and in the occupation of the utility's service area and in the means employed, as to be void, amounting to systematic administrative malevolence (*American Trust & Savings Bank v. Federal Reserve Bank*, 256 U. S. 359).

23) The question is also presented whether the discretion vested in the Tennessee Valley Authority in the prosecution of its utility program, in the use of federal resources and powers, in the selection of territory for occupation and of utilities for competitive exhaustion and in the matter of the means delegated to the Tennessee Valley Authority, is not so arbitrary as to be invalid under the Fifth Amendment as to those against whom this character of competition is employed by TVA, within the principle of *Yick Wo v. Hopkins*, 118 U. S. 356.

24) The record in this cause is conclusive that a utility whose service area or market is desired by TVA has no remedy to protect itself from arbitrary action and the certainty of forced abandonment of its property and business, if it does not yield to TVA, except by appeal to the courts to restrain the threatened competition. This record presents the question whether that recourse exists.

IV.

REASONS FOR ALLOWANCE OF WRIT.

The TVA program presented by this record is a proposal to commit the government to a permanent public and legislative policy of utility operation, covering all phases of the service, under circumstances that assure the monopoli-

zation or domination of utility service and the control of rates throughout the Tennessee River drainage area, by the government (TVA).

This result will be accompanied progressively by the forced or competitive withdrawal of existing utilities within the area, involving an active investment dedicated to the public service and taxed and regulated by the State amounting to not less than $500,000,000, and will establish a precedent for like extension throughout the nation.

The immediate result will be entrenched beyond retreat unless the decision of the Circuit Court of Appeals is reviewed and reversed in this proceeding. The Tennessee Valley Authority has reported applications for extension of the plan to more than two hundred municipalities. It has publicly and bitterly resented this judicial test. It has committed its policy of distribution to Memphis, to Chattanooga, and invites applications from all centers of distribution in the area.

The program involves grave constitutional questions, grave loss of tax revenue to the States and their subdivisions and to the federal government and a revolutionary transition of utility function from state control and personnel to federal investment and operation or control.

No such extensive and comprehensive proprietary undertaking, permanent in character, has ever been undertaken by the government.

There were introduced in the 74th Congress, 1st Session, some fifteen bills for the inauguration of similar federal undertakings in other areas, the basic constitutionality of which would be determined by this proceeding.*

*Appalachian Authority (Monongahela River and Kanawha River basins) H. R. 3622; Columbia Valley Authority (Columbia River, Grand Coulee Dam, Washington, Bonneville Dam, Oregon) S. 869, see also H. R. 2790, H. R. 5449; H. R. 4122 Central California Valleys Authority (Sacramento and San Joaquin Rivers) H. R. 5429; Connecticut Valley Authority, H. R. 4979; Upper Mississippi Authority, S. 98, H. R. 4683, H. R. 4684, H. R. 4685; Missouri Valley Authority, H. R. 4241; Mid-Continental Reclamation Commission, H. R. 4676 proposing to amend the Tennessee Valley Authority Act to include Tombigbee River and Bear Creek Basins; same, S. 1400; also like amendment to include Cumberland River Basin, S. 230.

If the program should be sustained no utility in reach of the program, or of its threatened and indefinite extension, could safely and intelligently plan its power supply in the public interest, because of lack of assurance as to when the government might elect to enter its service area with federal competition. Disorganization in utility service is inevitable; nationwide because of the nationwide objectives and purposes.

If the principle underlying the decision were sustained, there would be no discernible limitation upon the power of the federal government to engage in commercial enterprises in state domain, under the guise of disposing of war plants, or cultivating, growing, mining and thereupon processing, refining or converting government property into ultimate products with a view to commercial sale in competition with citizens in state domain.

The precedent would necessarily sustain the authority of the government, not merely to regulate local industry by federal competition, but to dominate and monopolize the production, manufacture, distribution and sale of every principal commodity and every substantial utility service heretofore considered as held open to citizens by the Constitution.

Acquiescence in the contention of the Tennessee Valley Authority on this record as to the power of Congress would vest in Congress, by majority of a quorum, authority to change the form and functions of the federal government and the industrial organization of the American people.

The decision of the Circuit Court of Appeals confuses the powers of Congress to regulate and promote navigation with the power to dispose of government property; and fails to consider or discuss the question of the power of Congress to authorize the government to operate commercially steam-electric or other war or federal purpose

plants in the commercial manufacture of electricity for sale for profit in state domain.

The Circuit Court of Appeals gave no consideration to the question of the lack of reasonable or constitutional relation between the region-wide utility and regulatory system proposed by TVA for non-federal objectives and the bona fide disposal of electricity lawfully manufactured or bona fide "disposal" of the properties.*

The Circuit Court of Appeals has confused and misapplied the phrase surplus water, as if synonymous with the product (electricity) resulting from the manufacturing process involved and has misconstrued and misapplied the Green Bay Cases (*Kaukauna Co. v. Green Bay Company*, 142 U. S. 254, and *Green Bay Co. v. Patten Paper Co.*, 172 U. S. 58), the case of *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53, and the Boulder Dam Case (*Arizona v. California*, 283 U. S. 423), and has erroneously failed to give effect to the cases which are contrary to its conclusion represented by (a) *Wisconsin v. Illinois*, 278 U. S. 267, and (b) by *Pollard v. Hagan, Shively v. Bowlby*, and *Port of Seattle v. Oregon-Washington Ry.*, supra, and (c) *Kansas v. Colorado*, 206 U. S. 89. The confusion and misapplication above stated are of national and far reaching importance.

Wherefore, your petitioners pray that writs of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the following cases

*The District Court's finding No. 92 (II-1069) is as follows: "92. The War Department, because of the stated desirability of holding the Muscle Shoals power plants free for other governmental disposition, has declined offers of the power companies for the lease of the power facilities, one of the offers being a rental of $2,200,000 annually."

numbered and entitled on its docket: Tennessee Valley Authority et al., Appellants, vs. George Ashwander et al., Appellees, No. 7764; and George Ashwander, et al., Cross-Appellants, vs. Tennessee Valley Authority, et al., Cross-Appellees, No. 7812, to the end that the said causes may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other or further relief as to this Court may seem proper.

(A supporting brief is filed separately.)

Respectfully submitted,

GEORGE ASHWANDER,
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